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IN THE

Supreme Court of the United States

October Term, 1952

No. 337

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

BONANZA AIR LINES, INC.,

Intervenor.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

HUGH W. DARLING,
523 West Sixth Street,
Los Angeles 14, California,
Attorney for Petitioner.

POGUE & NEAL,
730 Southern Building,
805 Fifteenth Street, N. W.,
Washington 5, D. C.

GUTHRIE, DARLING & SHATTUCK,
737 Pacific Mutual Building,
523 West Sixth Street,
Los Angeles 14, California,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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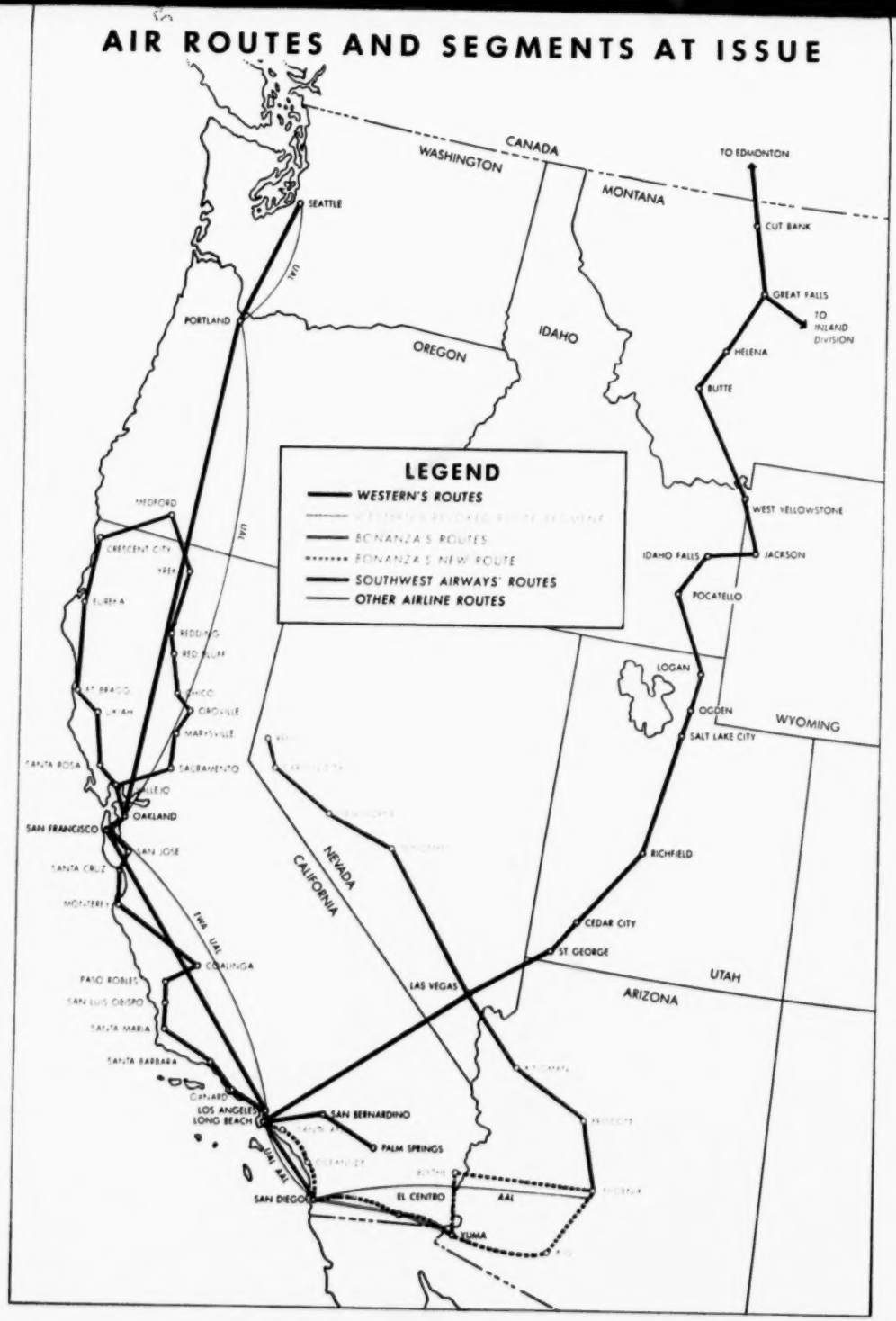
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BONANZA AIR LINES, INC.,

Intervenor.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Western Air Lines, Inc., respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above captioned proceeding.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit being challenged is reported in 196 F. 2d 933 and in the record of this proceeding commencing at page 80.[1]

The opinion of the Civil Aeronautics Board, which was reviewed and affirmed by the Court of Appeals for the Ninth Circuit, is included in the record of this proceeding commencing at page 6.

[1]For convenience, the opinion of the Ninth Circuit is included in this Petition as Appendix A.

Jurisdictional Statement.

The judgment of the Court of Appeals was entered on May 19, 1952 [R. 85.] The time to file this petition was extended until September 16, 1952, by an order of this Court signed on August 1, 1952 [R. 85]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1), and 49 U. S. C., Section 646(f).

Summary of Matter Involved.

A. Preface.

By its order made on January 17, 1952 [R. 6-78], the Civil Aeronautics Board, Respondent, purportedly suspended the permanently certificated right of Western Air Lines, Inc., Petitioner, to provide air transportation of persons, property and mail at El Centro, California, and Yuma, Arizona, in order to issue a new certificate, stated to be temporary, authorizing Bonanza Air Lines, Inc., Intervenor, to provide air transportation at the same communities.

The Civil Aeronautics Board based its right to order this change in the air carriers authorized to provide air transportation at El Centro and Yuma on Section 401(h) of the Civil Aeronautics Act[2] [R. 16-17]. The pertinent

[2]"401(h) [52 Stat. 57, 49 U. S. C. 481] The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

portion of this section provides that upon petition or complaint, or upon its own initiative, the Board "may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule or regulation issued hereunder, or any term, condition or limitation of this certificate, . . ."

The section vests two separate powers in the Board. One power is to amend or suspend, in whole or in part, a certificate, if required by the public convenience and necessity. The other is to revoke a certificate, in whole or in part, in the event of an intentional default by the carrier.

No contention was made below that Western was guilty of an intentional and uncured default which might have enabled the Board to invoke the revocation power. Nor was it contended below that air transportation at El Centro and Yuma was no longer required by the public convenience and necessity, or that the service being provided by Western was inadequate to meet the public convenience and necessity. The shift—Western eliminated and Bonanza installed—was made ostensibly to determine by an experiment whether or not Bonanza's "feeder type" air service would serve the needs of the area better than Western's "trunk line" service [R. 22, 24].

Western advanced to the Ninth Circuit two basic points. First, that despite the cautious words employed the Board's order amounted to a revocation in part of Western's permanent certificate for Route No. 13 without statutory warrant. Second, that even if the order amounted only to a suspension Congress did not intend by Section 401(h) of the Act to empower the Board to

eliminate a permanently certificated air carrier in order to install a new temporarily certificated air carrier.

B. Facts Pertinent to the Issues.

Western, the oldest American Flag airline, was permanently certificated to serve El Centro as an intermediate point on its Route No. 13 by an order of the Board dated May 10, 1943, and by an order made in 1946 Yuma was added as another permanent intermediate point [R. 28, 29].

Bonanza is one of the smallest local service or feeder air carriers, with, until the extension granted in this proceeding, a route system of 639 miles, running between Reno, Nevada, and Phoenix, Arizona, serving eight communities [R. 21, 22].

The Board made no finding and reached no conclusion that the public convenience and necessity no longer required air service at either El Centro or Yuma. To the contrary, implicit in the Board's order is the finding that the public convenience and necessity required a continuation of air service at both stations.

The Board found specifically that the traffic potential did not justify the service of two air carriers at El Centro and Yuma:

> "The Examiner noted, and we agree, that the selection of a carrier to render the local air service between San Diego and Phoenix necessarily involves the question of suspension of Western's authority at El Centro and Yuma, and Frontier's authority over its Yuma-Ajo-Phoenix segment since there is insuffi-

cient traffic potential at any of these points to justify service by more than a single carrier." [R. 16.]

* * * * * * * *

There was no finding by the Board that Western's service at El Centro and Yuma had been inadequate or in anywise contrary to the requirements imposed by the Act and by the applicable rules and regulations of the Board. Nor is there any statement in the Board's opinion to the effect that Western had been requested to provide more or different service or use a different type of equipment in connection with its Imperial Valley operation at El Centro or Yuma.[3]

The Board's order made no provision for compensating Western for any damage it might sustain by having its property rights taken from it and turned over to Bonanza. These rights involved the energy and money that went into the initial development of air traffic at El Centro and Yuma, neither of which communities had had the benefits that flow from air transportation prior to the inauguration of service by Western under its permanent certificate. The order contains the unwritten, but perfectly obvious, provision that should Bonanza's certificate end on December 31, 1952, the present termination date, or at some later though indefinite date, Western would have the

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[3]In the opinion below the Ninth Circuit stated:

"The Board based its suspension of the trunk line, Western, on findings that the San Diego-El Centro-Yuma segments required local service and that Western was unwilling to operate a truly local service route there." [R. 83; App. A p. 5.]

Not a word in the Board's opinion supports or in any wise justifies the Court's assertion that Western was unwilling to operate a truly local service route or that the Board made any such finding or that the Board based the suspension order on that theory.

automatic burden of re-establishing air transportation at El Centro and Yuma. The burden of having to stand in readiness to resume a service once permanently certificated and then placed in suspension in favor of another carrier would be heavy and costly. The order makes no provision for compensating Western for this burden.

The principal matter at stake is whether or not Section 401(h) of the Act, or any other section, cloaks the Board with authority to redesign the route structure of the national air pattern, either by recasting the routes of all or any of the certificated air carriers or by removing, absent an intentional and uncured default, all or any of the carriers from all or a part of their permanently certificated operations in order to install new carriers offering a similar or dissimilar type of service.

Questions Presented.

1. Does the Civil Aeronautics Act by Section 401(h), or any other section, empower the Civil Aeronautics Board to redesign the route structure of the national air pattern?

2. Does the Civil Aeronautics Board have the power to remove an air carrier from all or any portion of a permanently certificated route by alteration, amendment, modification or suspension for the purpose of installing a different air carrier when the public convenience and necessity require air service by one carrier, but not by two?

3. Does the Civil Aeronautics Board have the power to remove an air carrier from a permanently certificated route segment and turn the segment over to another carrier without providing just compensation to the removed carrier for the property and property rights lost in consequence of the removal?

Specification of Errors to Be Urged.

The United States Court of Appeals for the Ninth Circuit erred in holding:

1. That, notwithstanding the finding that a continuation of the service was required by the public convenience and necessity, the Board had the power to suspend Western's permanently certificated right to provide air transportation at El Centro and Yuma for the purpose of granting to Bonanza the right to provide air transportation at those communities under a purportedly temporary certificate in connection wth an experiment;

2. That removal of Western from El Centro and Yuma amounted to a suspension rather than a revocation of Western's permanently certificated rights;

3. That the due process issue had not been presented in adequate manner before the Board, and that accordingly it was proper for the Board not to rule on the point; and

4. That Western's failure adequately to present the due process issue before the Civil Aeronautics Board was not excusable, and accordingly that the issue should not be considered by the Court on review.

Reasons for Granting the Writ.

A. It Is of Compelling Importance to the American Flag Air Transportation Industry That This Court Decide With Finality and Clarity Whether or Not by Section 401(h) of the Civil Aeronautics Act Congress Intended to Vest the Board With the Extraordinary Power of Redesigning the Air Route Map From Time to Time, and if so, Under What Circumstances and to What Extent the Power May Be Exercised.

The Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

Even though the opinion of the Ninth Circuit and the somewhat comparable opinion of the Seventh Circuit, to which reference will be made, were complete and precise, the importance of the question to the American Flag air transportation industry is so great, and the influence of the decisions on that industry is so significant, that the question should be settled by this Court. With the two decisions leaving many important phases of the question unanswered, and other phases answered with indecision, it is imperative that the question be settled by this Court.

It is one thing to force a permanently certificated air carrier to discontinue service when the public convenience and necessity no longer require any air service on a segment or at a station. The amending portion of Section 401(h) enables the Board to accomplish this proper objective should the carrier involved fail to apply for voluntary abandonment of service under Section 401(k) of the Act (49 U. S. C. 481).

It is quite another thing to force a permanently certificated air carrier, against its will and unsupported by a

default, to discontinue service on a segment or at a station when the public convenience and necessity continue to require air transportation, simply for the purpose of enabling the Board to authorize some other air carrier to furnish air transportation over the same segment or at the same station. This is the important question of federal law, inadequately decided by the Ninth Circuit, which has not been, but should be, settled by this Court.

Had Congress intended to confer such unusual power on the Board, precise and unequivocal language would have been used. Since the most that can be said in favor of Section 401(h), so far as it may confer the power which the Board has chosen to arrogate, is that the language is not as clear as it might be and requires judicial construction, it is essential that this Court speak.

On May 19, 1952, the Ninth Circuit, in the case with which this petition is concerned, apparently affirmed, and for the first time, the Board's interpretation that it has the power under Section 401(h) to redesign the national air pattern by removing a permanently certificated carrier to make room for a new carrier. But the equivocal and somewhat hazy language used by the Court below leaves much to be wanted and preserves in large part the uncertainties that prevailed before that Court spoke.

On July 8, 1952, in *United Air Lines, Inc. v. Civil Aeronautics Board*,[4] the United States Court of Appeals for the Seventh Circuit held in a related case that the Board had the power to suspend the permanently certificated service of United Air Lines, Inc. at stated points in order that a previously temporarily certificated

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[4]The opinion, not yet in the advance sheets, is included in this Petition as Appendix B.

so-called local service air carrier might be able to enjoy the business without competition. The affirming language used by the Seventh Circuit adds little stature to the earlier decision of the Ninth Circuit and removes none of the doubts and uncertainties concerning the Board's power under Section 401(h) which were left dangling by the decision of the Ninth Circuit.

The two decisions ignored many riddles which still remain to perplex the members of the air transportation industry.

If, as seems to be the case under the Ninth Circuit decision, the Board have the power to suspend out a permanently certificated carrier in order to conduct an experiment with a new carrier, how long may the suspension remain effective before the suspended carrier must take action to protect its rights? What is required of the suspended carrier in the meantime by way of maintaining stand-by readiness to resume operations should the Board decree a restitution of the former status?

If, as implied if not ruled by the Seventh Circuit, the Board's amending power under Section 401(h) have some limitation in that the changes ordered "must be partial and not total" (App. B, p. 10), at what point does the change cease to be partial and become a prohibited amendment?

If the Board have the power to suspend United out of Santa Barbara in order to eliminate competition with Southwest Airways, in response to the public convenience and necessity, as was done in one of the orders on review to the Seventh Circuit, does the Board have the power to suspend United out of its West Coast operation from San Diego to Seattle on the theory that the public convenience

and necessity require that Western conduct that operation free from competition at the hands of United?

If the Board possess the extraordinary power it claims to have under Section 401(h), the air transportation industry is entitled to have this Court confirm it and the industry is entitled to have this Court state with clarity what, if any, the limitations may be on that power. It is not right that the implementation of such vast power be left to the judgment of a majority of the five members of the Civil Aeronautics Board. And it is not a satisfactory answer to say that the majority will act in the utmost good faith and with the benefit of exalted wisdom.

B. The Decision of the Ninth Circuit Is Not Good Law and Should Be Reversed by This Court.

If only the Ninth Circuit had spoken on the point, the importance of having a final word from this Court might not be quite so compelling. But with the Seventh Circuit apparently approving the decision of the Ninth Circuit, still with grossly inadequate signposts and boundary lines, a decision of this Court is urgent to avoid the adoption by the Board under bad case law of a comprehensive program, already underway, designed to recast the course and the structure of the national air route pattern.

The order of the Board under scrutiny and the affirming decision of the Ninth Circuit, including the contemporary decision of the Seventh Circuit, seem to hold to the view that the Civil Aeronautics Act empowers the Civil Aeronautics Board to order anything concerning air transportation which the Board finds to be required by the public convenience and necessity. This is not a sound legal conclusion and many provisions in the Act reject it.

An administrative agency has such power, and only such power, as is conferred upon it by Congress. (*Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission,* 291 U. S. 587, at 598, 78 L. Ed. 1007, at 1013 (1934).)

The statutory power of an administrative agency must be construed with exactness, may not be enlarged by implication and should be interpreted in limitation rather than in enlargement of power.

> "The question debated is whether it vested in the Commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication." (*Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.,* 167 U. S. 479 at 494, 42 L. Ed. 243 at 251 (1896).)
>
> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions." (*Federal Trade Commission v. Raladam Co.,* 283 U. S. 643, at 649, 75 L. Ed. 1324, at 1330 (1930).)

". . . any reasonable doubt of the existence of any particular power in the Commission should be resolved against the exercise of such power." (*Backus-Brooks Co. v. Northern Pacific Ry. Co.,* 21 F. 2d 4, at 19 (C. C. A. 8th, 1927).)

These sound principles of law have been framed in strong language by the Interstate Commerce Commission.

". . . The United States Supreme Court has frequently held that the Commission is an agency of limited powers and authority; that, while Congress may delegate to the Commission certain of its own powers and authority, the exercise of such delegation does not extend beyond expressed enactment or its fairly implied inferences; and that important powers should not be read into the act by implication but should be conferred in clear and unmistakable terms. *Thompson v. United States,* 246 U. S. 547; *United States v. Pennsylvania R. Co.,* 242 U. S. 208; and *Interstate Commerce Commission v. Cincinnati,, N. O. & T. P. Ry. Co.,* 167 U. S. 479. We have also found that, in the absence of specific language, only the most unmistakable evidence of the intention to confer upon us the power to act under given circumstances would warrant the assumption of such power through our own construction of the act. *Wisconsin R. Comm. v. Chicago & N. W. Ry. Co.,* 87 I. C. C. 198." (*Smith Brothers, Revocation of Certificate,* 33 M. C. C. 465, at 471 (1942).)

The need of a judicial barrier against the human propensity of an administrative agency to grasp out for greater power has been stated in clear language by the Supreme Court of the State of Oregon.

"It has for a long time been considered the safer and better rule, in determining questions of jurisdic-

tion of boards and officers exercising powers delegated to them by the legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act.

"There is too strong a desire in the human heart to exercise authority, and too much of a disposition upon the part of those intrusted with it to extend it beyond the design for which and the scope within which it was intended it should be exercised, to leave the question of its extent to inference.[5] Should it be so left serious disturbances might arise involving a conflict of jurisdiction, which would be highly detrimental to the community." (*Board of Railrod Commissioners of Oregon v. Oregon Railway and Navigation Co.*, 17 Ore. 65, 19 P. 2d 702, at 707 (1888).)

Section 401(e)(1) of the Act (49 U. S. C. 481) made it mandatory upon the Board to issue grandfather certificates to all air carriers operating on May 14, 1938. It is not to be doubted that some of the grandfather certificates which the Board had to, and did, issue were not required by the public convenience and necessity, and it is safe to suggest that some of them were adverse to the public interest. Had Congress intended to confer the powers claimed by the Board under Section 401(h), it is not likely that Congress would have bothered to include the grandfather clause, as by acting under the claimed powers of Section 401(h) the Board could have stultified Section 401(e)(1).

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[5]Emphasis in quoted material is added throughout unless otherwise noted.

Section 401(i)[6] does not empower the Board to force an air carrier to transfer one of its certificates (either a grandfather certificate or a permanent Section 401(d)(1) certificate) to some other carrier. Still there must exist today many situations under which the public convenience and necessity would be served handsomely were the Board able to compel some redealing of certificates.

Sections 408(a) and (b) (49 U. S. C. 488) prohibit mergers and consolidations among air carriers unless found to be consistent with the public interest and approved by the Board after a hearing. Neither those sections, nor any other section in the Act, empowers the Board to compel a merger or consolidation of two or more air carriers. It would be most unusual if changing circumstances occasionally were not to bring about a condition under which the public convenience and necessity required the consolidation or merger of two carriers into one.

Had Congress intended to cloak the Board with the extraordinary power to recast the route structure of the national air pattern by adding or subtracting, by rerouting, by shifting from one carrier to another or by eliminating one carrier in favor of another to meet changed conditions or to conform to the changed philosophy of the same Board or a different philosophy of a new Board, it would have been very simple for Congress to include a section in the Act specifically vesting the power in the Board. The members of the industry then would

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[6]"401(i) [49 U. S. C. 481] No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest."

have known the extent to which changes could be forced on their operations and their route structures.

To enable the Board to do what it did in this case Section 401(h) would have to provide that the Board, on its own motion, or otherwise, has the power to alter, amend, modify or suspend a certificate, in whole or in part, in connection with the aleration, amendment, modification or suspension of a certificate of another carrier or in connection with the issuance of a new certificate to another carrier, whereby air carriers are changed in a given area or at a given point or whereby one existing carrier is retained and the other removed to eliminate competition. Section 401(h) does not now contain language which will permit such power to be read into it.

The essence of the Board's interpretation of Section 401(h) is to expand its limited power under the section to provide that upon two or more petitions, or upon its own initiative, the Board may alter, amend, modify, or suspend two or more certificates. This would permit the Board in a single proceeding and in a single order to amend one certificate by eliminating the existing service and concurrently amending another certificate to add the same service, resulting in a continuation of the service with a change of carriers. But the section uses the word "petition" only in the singular and the word "certificate" only in the singular. Hence, any amending action taken by the Board with respect to one certificate cannot be depended upon concurrent amending action being taken with respect to some other certificate. As the Act now reads the Board simply does not have this power, any more than it has the power to order an involuntary merger between two carriers or order an involuntary transfer of a certifi-

cate from one carrier to another, however much such an order might be required by the public convenience and necessity.

The only reasonable interpretation which can be placed on the amending power of the Board, as conferred by Section 401(h), is that a particular service may be amended out *if no longer required by the public convenience and necessity* or amended in if required by the public convenience and necessity. If the public convenience and necessity did not require Western's service at El Centro and Yuma, and that is the only basis under which Western could be amended or suspended out, the public convenience and necessity could not have required Bonanza's service. Even though it could have been argued that Bonanza might do a better job than Western was doing, the section does not vest in the Board the power to substitute carriers.

Section 404(a)[7] makes it the duty of every air carrier to provide safe and *adequate* service. If it were a fact that Western's service at El Centro and Yuma was inadequate, on the theory that it was not as satisfactory

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[7]"404(a) [49 U. S. C. 484] It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers."

as that which Bonanza could provide, then it was incumbent upon the Board under Section 401(h) to issue an order to Western commanding obedience to Section 404(a), requiring adequate service. If within a reasonable time Western failed to establish adequate service, service comparable to that which Bonanza claimed it would offer, assuming it to be better, then the Board could have revoked Western out under Section 401(h). That is the only method whereby the Board may accomplish its recasting and redesigning program, unless and until Congress amends the Act to add a section which will give the Board the power it has usurped.

Even though by excessive stretching the power claimed by the Board might be read into Section 401(h), the result would do violence to one of the principal objectives of the Act—to lend stability to the then (and still) growing air transportation industry.

Concerning H. R. 9738 this statement appears in 83 Congressional Record at page 5960:

> ". . . if this legislation is enacted, the air carriers will be able to operate on a *stable basis,* their routes *secured* by a certificate of convenience and necessity which may be *revoked only for cause* . . ."

On page 8500 of the same record, Congressman Lea, floor manager of the bill, is quoted as saying:

> "In my judgment . . . *two things are the fundamental and essential needs of aviation at this time, security and stability in the route* and protection

against cutthroat competition. . . . We want to give financial stability to these companies so they can finance their operations and finance them to advantage."

The insistent and predominate need of stability and some semblance of permanency in the industry was recognized by the Federal Aviation Commission implemented by President Roosevelt prior to the Civil Aeronautics Act to investigate the then infant and confused air transportation industry and recommend appropriate legislation. In the report of that Commission, dated January 30, 1935, which appears as Senate Document No. 15 of the 74th Congress, First Session, in Volume IV, commencing at page 9898, this lucid and prescient statement is found:

". . . *The air transport map cannot be redrawn every few years without utterly disastrous effect on the service. New lines ought to be created on a substantially permanent basis. An air line cannot be casually torn up and transplanted.* The fixed investment in land, buildings, and equipment, of a major airline ranges, according to the best information that we can secure, from $200 to $500 per mile of route. Where there are lines that have not a penny of such investment, and that depend entirely on rental of existing structures and services, they do not seem to us to offer an ideal example of the type of service that ought to be developed in the future."

The report of this Commission played a major part in the enactment of the Civil Aeronautics Act of 1938.

Section 2 of the Act[8] confirms that the encouragement and development of a sound air transportation system are the underlying objectives which Congress had in mind. An unstable transportation system is not a sound transportation system. Nothing could lead to greater instability in a transportation system than uncertainty attending route certificates. Even though only the very finest faith were employed and the most skillful judgment applied the air transportation industry could not be sound and would not be encouraged and developed if three human beings had the power to redesign the structure of the national air route pattern to conform to their views from time to time of what the public convenience and necessity required in light of changed conditions.

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[8]"2 [49 U. S. C. 402] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Thus, should the tortured construction of Section 401(h) adopted by the Board, and apparently approved by the Ninth and Seventh Circuits, be allowed to stand, one of the most important reasons for enacting the Civil Aeronautics Act will be undermined.

Finally, should it now be a fact that the power to redesign the national air pattern is more important than solidity and stability in the industry, the determination should be made by Congress, not by means of a strained judicial interpretation.

C. If It Be the Decision of This Court That Section 401(h) of the Act Was Intended by Congress to Mean What the Board Has Interpreted It to Mean, It Should Be Determined to What Extent a Carrier Is Entitled to Compensation When a Route Segment Is Taken Away From It and Given to Another Carrier.

The Ninth Circuit declined to consider the constitutional issue of whether Western had been deprived of property without due process, on the ground that reference to the issue before the Board was inadequate.

The Seventh Circuit dealt with the point in somewhat peremptory fashion by quoting Section 401(j) of the Act,[9] and by ruling that United and all other holders of certificates of public convenience and necessity acquire whatever rights they may possess subject to the Board's power to alter, amend, modify or suspend certificates. (App. B, p. 15.)

In its brief to the Ninth Circuit Western pointed out the manner in which it had urged before the Board the

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[9] "401(j) [49 U. S. C. 481] No certificate shall confer any proprietary, property or exclusive right in the use of any air space, civil airway, landing area, or air navigation facility."

constitutional question of due process, arguing that, even though the method of urging the point had been inadequate, reasonable grounds existed for having failed to stress the point below. Under Section 1006(e) of the Act,[10] the Court below should have considered and ruled upon the issue, since it is a matter of such importance to the industry.

It is unthinkable that Section 401(j) goes so far as to provide, even under the Board's interpretation of Section 401(h), that a route segment can be taken from a carrier in good standing and transferred over to a new carrier without some provision for compensation to the pioneering carrier.

An air carrier may not have a proprietary or property right in the use of air space or a civil airway or a landing area or an air navigation facility, but it does have a proprietary and property right in airport leaseholds or fees, in ticket office leaseholds or fees, in ground equipment and in the good will of the air-traveling public built up over a period of time at substantial cost.

Even though this Court were to uphold the Board's interpretation of its own power under Section 401(h), either with or without expressing some limitations on that power, the issue of an air carrier's right to compensation when it is ejected from a permanently certificated route segment in favor of a newcomer should be settled.

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[10]"1006(e) [49 U. S. C. 646] The findings of fact by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Conclusion.

The importance to the American Flag air transportation industry of having all phases of the matters here at stake resolved with finality and with clarity, whichever view this Court might accept, affords a compelling reason for issuing the requested writ of certiorari. In addition, the very real probability that both the Ninth Circuit and the Seventh Circuit erred in upholding the Board's overcolored interpretation of Section 401(h) offers an added and a significant reason for the need of a decision from this Court.

Los Angeles, California, September 12, 1952.

Respectfully submitted,

HUGH W. DARLING,
Attorney for Petitioner.

POGUE & NEAL,
GUTHRIE, DARLING & SHATTUCK,
Of Counsel.

Appendix A.

United States Court of Appeals for the Ninth Circuit.

Western Air Lines, Inc., Petitioner, vs. Civil Aeronautics Board, Respondent. No. 13,245. May 19, 1952.

PETITION TO REVIEW AN ORDER OF THE CIVIL AERONAUTICS BOARD.

Before: DENMAN, Chief Judge, and STEPHENS and BONE, Circuit Judges.

DENMAN, Chief Judge:

This is a petition by Western Air Lines, Inc., to review an order of the Civil Aeronautics Board made on January 17, 1952, which ordered the following, *inter alia:*

1. The denial of Western's application for an extension from Yuma to Phoenix of its existing certificate of public convenience covering Los Angeles-San Diego-El Centro-Yuma.

2. A suspension for a limited time of Western's authority to serve El Centro and Yuma.

3. The denial of the application of Southwest Airways Co. for an extension of its route to cover Los Angeles-Phoenix via certain way points.

4. The granting of Bonanza Air Lines, an intervenor in this review proceeding, of a route extension to cover, *inter alia,* the cities at which Western was suspended. Immediately after the Board decision, the petitioner Western made a motion in this court under 49 U. S. C. §646(d) to stay the effectiveness of the order and on February 18, 1952, this court entered its stay order, confining our con-

sideration to the question of the power of the Board to make a limited suspension of Western's service to El Centro, California, and Yuma, Arizona.

The Board order here in question is a step in the determination of the difficult problem of certificating proper air service for the Southern California, Arizona local area which has been before the Board for over ten years in a proceeding called the California-Nevada Service Case. The history of this problem is set out in the Examiner's Report, appended to the order here in question, ... C. A. B. ...., at .....

Suffice it to say for this decision that Western, a trunk line operating under a permanent certificate, had been given authority in 1943 to serve El Centro, California, and in 1946 to serve Yuma, Arizona. This authority was suspended by the order here in question until December 31, 1952, the date that the life of Bonanza Airlines, a temporarily certificated carrier, expires, or until the Board should finally determine a timely application by Bonanza for an extension of its temporary certificate. Concurrent with Western's suspension, at El Centro and Yuma, Bonanza was given authority to serve those cities under its temporary certificate.

Western attacks its suspension and divides its argument into three branches: (a) the order, rather than being a suspension, amounts to a revocation and does not meet the statutory requirements for revocation; (b) if the order is a suspension, it is invalid since the Board may not eliminate a permanently-certificated air carrier to make room for a new carrier; and (c) the suspension violates the Fifth Amendment since Western's property is taken for a public use without just compensation.

(a) 49 U. S. C. §481(h) provides:

"The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided, That no such certificate shall be revoked unless* the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated . . ."

Western says that its suspension at El Centro and Yuma is permanent and thus in substance a revocation, because the history of feeder airlines like Bonanza shows that they are permanent. Consequently, the Board is not going to put Bonanza to its development costs at those places unless the Board intends to leave Bonanza there permanently and keep Western out of that segment of the air map permanently.

We are not convinced by Western's argument that the Board order is in substance a permanent revocation of Western's certificate. The order says in terms that the suspension will remain in effect until December 19, 1952, when Bonanza's temporary certificate expires, or until action is taken on a petition by Bonanza for an extension

of its temporary certificate. At that time, seven months hence, the situation confronting the Board in this Southern California-Arizona air route problem may be materially different from the one that faced the Board on January 17, 1952.

For example, the Board may then decide to deny any further extensions to Bonanza, even though this is improbable as Western points out. Or it may make a finding that the two cities cannot support air service at all, in which case Western concedes the power of suspension, or the Board may find that the cities will be better served as segments in a trunk line operation. There might also be a public necessity for two carriers, or Western itself may petition to suspend service to those cities, as indeed it did on March 16, 1949, on the ground that service to those points was not economical. Finally, the Board at that time may move to revoke Western's authority for a default, if there is such; or it may "alter, amend or modify" Western's certificate which it says it may do so long as a basic transformation is not worked in the certificate of Western.

In the face of all these possibilities that will face the Board within a very short time, it is the merest speculation to say that the suspension order is in substance a permanent revocation. There will be more to sink our teeth into when we see what is done on December 19, 1952, or thereafter in relation to Bonanza's petition for extension.

(b) The Board based its suspension of the trunk line, Western, on findings that the San Diego-El Centro-Yuma segments required local service and that Western was unwilling to operate a truly local service route there. In accordance with its long-established policy, the Board awarded the local service route, including the Yuma-Phoenix segment not previously served by Western, to a local service airline, Bonanza. Western says this kind of substitution of carriers under the Board's suspension power is invalid because the Board may only suspend when no air service at all is required. We do not so construe the Act. The Board may classify between types of air service and may find that one kind of air service is not appropriate during a certain time. To say that the Board could not substitute during that time another type of air service, required as a public necessity, would be an unreasonable limitation upon the Board's power to plot the air map, primarily in the public interest.

The statutory language, quoted *supra,* makes it appear that the only limitation on the Board's power to *suspend* is that the public convenience and necessity require suspension. The certificate granted to Western was also subject to power in the Board to "alter, amend [or] modify" it in the public convenience or necessity.

Although the issue here is the Board's power to suspend, one of the things we ought to consider in determining the power of suspension is the Board's power to alter Western's certificate at the end of this suspension

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Appendix B.

In the United States Court of Appeals for the Seventh Circuit.

October Term, 1951, April Session, 1952. Nos. 10544 and 10567.

United Air Lines, Inc., Petitioner, vs. Civil Aeronautics Board, Respondent.

On petitions for Review of Orders of Civil Aeronautics Board.

July 8, 1952.

Before DUFFY, FINNEGAN and LINDLEY, Circuit Judges.

DUFFY, Circiut Judge. Petitioner United Air Lines, Inc. (hereinafter called United) asks us to review and reverse orders entered in two proceedings before the Civil Aeronautics Board (hereinafter called Board). No. 10544 was designated before the Board as the Frontier Renewal Case, and No. 10567 as the Southwest Renewal-United Suspension Case.

United operates an air line system over 18,704 certificated route miles. Its routes extend from New York to Hawaii, and its transcontinental system extends from New York and other eastern cities to various West Coast cities. It also operates local service between various intermediate points.

Rock Springs, Wyoming, is a city of 10,567 population, and has been a certificated point on United's Route No. 1. United originally was authorized to serve Rock Springs under a certificate issued pursuant to the Board's order of May 22, 1939, in accordance with the "grandfather" provisions of Sec. 401(e)(1), Civil Aeronautics Act, 49 U. S. C. 481 (hereinafter called the Act).

Frontier Air Lines, Inc. (hereinafter called Frontier) serves Rock Springs as a point on a local air service route serving small cities in the Rocky Mountain area. Authorization to serve Rock Springs on this route pursuant to a temporary certificate of public convenience and necessity was originally granted for a three year period to Summit Air Ways, Inc., a predecessor of Frontier. This authority granted to Frontier was predicated largely upon findings as to the lack of adequate transportation facilities in a specified area because of the mountainous terrain, and the economic characteristics of the area.

In a consolidated proceeding, the Board directed Frontier to show cause why its temporary certificates of public convenience and necessity for Routes Nos. 73 and 74 should not be extended three years from March 31, 1950. The Board directed United to show cause why its authority to serve Rock Springs and Cheyenne, Wyoming, should not be suspended until March 31, 1953. Public hearings were held before an examiner who issued his report recommending that Frontier's certificate be renewed for a period of three years from March 31, 1950, including the authority to serve Rock Springs and Cheyenne, and that United's authority to serve Rock Springs be suspended until March 31, 1953. However, the examiner did not recommend a suspension of United's authority to serve Cheyenne. The rugged terrain of the Rocky Mountain area in many places imposes serious obstacles to surface transportation. The examiner's report emphasized the need for local air service for the area involved because of geographical characteristics. He found also that both United and Frontier would benefit financially by the suspension of service to and from Rock Springs by United. The examiner further found that

the suspension of service by United at Rock Springs would inconvenience only a small part of the passengers to and from that point, and concluded that the public convenience and necessity required the suspension of United's service at Rock Springs until March 31, 1953. The Board substantially adopted the examiner's findings and conclusions and entered its opinions and orders on September 14, 1951, and November 9, 1951. The Board found Monarch Air Lines and Challenger Air Lines[1] had operated in a region where geographical conditions impeded efficient surface transportation between communities of substantial size, and that there was a public need in that area for air service, and that Monarch and Challenger had made steady improvement in furnishing such service. The Board also approved the examiner's finding that an uneconomic duplication of air service by United and Frontier existed at Rock Springs. In No. 10544 petitioner seeks a review of said orders in so far as they suspend the authority of United to serve Rock Springs, Wyoming, for the period beginning January 12, 1952, to and including March 31, 1953.

In the Southwest case two orders were consolidated by the Board, one directing United to show cause why its authority to serve Santa Barbara, Monterey, Red Bluff and Eureka, California, should not be supended and the other instituting an investigation to determine whether service by Southwest Airways Company (hereinafter called Southwest) should be substituted for service by United at Salinas, California, and Klamath Falls, Oregon.

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[1]These two air lines were consolidated and the company name became Frontier Air Lines, Inc.

United serves Monterey and Santa Barbara on its Route No. 1 between Seattle, Washington, and San Diego, California, pursuant to a certificate originally granted on May 22, 1939, in accordance with the "grandfather" provisions of the Act. Southwest was certified to provide local air service to Eureka, Monterey, Santa Barbara, and Red Bluff.

United's service and authorizations antedated those of Frontier and Southwest at all cities in question in both proceedings except Eureka, where the authorizations for United and for Southwest were of the same date. United inaugurated service at Rock Springs, Santa Barbara and Monterey in July, 1927, October, 1936, and August, 1938, respectively, and its service at Red Bluff and Eureka was instituted in August, 1940, and December, 1946, respectively. The temporary certificates issued to Frontier and Southwest were issued pursuant to Sec. 401(d)(2) of the Act.

In the Southwest case, after hearings had been held and a report filed by an examiner, the Board made detailed findings upon the issue of suspending United's service, and concluded that the public convenience and necessity required the suspension of service of United at Santa Barbara, Monterey, Red Bluff and Eureka, California, until September 30, 1954, but that service by Southwest should not be substituted for service by United at Salinas and Klamath Falls.

In the Southwest case the Board found that in the area north of San Francisco transportation was slow and many times circuitous, and that local service would offer an appreciable improvement in transportation facilities. The Board concluded public convenience and necessity re-

quired a local air service route for a period of three years along the Coast, serving among other points Eureka, and also an inland route serving among other points Red Bluff.

As to the general policy of extending the certificates of local air service carriers, the Board emphasized (1) the substantial contribution made by local air service carriers to the development of an air transportation system meeting the needs of commerce and the postal service, (2) the considerable national defense value of the operations of such carriers, and (3) the economic problems faced by such carriers in achieving self-sufficiency. The Board stated, "From the information now before the Board we are of the general opinion that feeder service should seldom if ever be competitive. The traffic potential is so limited in most feeder territory that duplicate operations by two or more carriers can seldom if ever be economical. We have reached the conclusion that in general where a feeder carrier's route is duplicated by a trunkline carrier and such route is not necessary to the trunkline carrier's operation, then such route should be served by the feeder carrier alone. Conversely, where a route is a necessary and integral part of a trunkline carrier's system and essential to its economical operation, then such route should not be served by a feeder carrier."

The Board also declared, "In reaching our final conclusion to suspend, we wish to emphasize the temporary nature of our action. It is our desire, herein, to conduct an experiment to determine and compare the results of

non-competitive service by a local service air carrier with those which obtained when competition between such air carrier and a trunkline was in force at the same points. If in fact substantial savings can be realized by the Government we may be impelled to take similar action at other points in the air transportation system. If Southwest in fact becomes self-sufficient in 1954 there may no longer be any need for the suspensions ordered herein. Even if Southwest does not achieve financial independence but no net savings derive from the experiment, United may be restored. In any event our action herein should be considered in its true light as a temporary step in an effort to experiment with techniques of reducing Federal subsidy in transportation."

The Board's opinion and order (Serial No. E-6063) to effectuate suspension of service by United at Santa Barbara, Monterey, Red Bluff and Eureka were dated January 29, 1952, and in No. 10567 petitioner seeks a review of the order in so far as it suspends United's authority to serve these four California cities.

Petitioner claims that in making the orders here in dispute the Board was attempting to exercise unauthorized power and authority "for the realignment of domestic air lines pattern"; that Congress did not grant to the Board the power of compulsory route realignment; and that the Board is attempting such a realignment under the guise of its power of suspension. Petitioner also argues that its certificates of public convenience and necessity are its property, and that the Board's orders violate

the Fifth Amendment of the United States Constitution prohibiting the taking of private property without due process and without compensation. Petitioner also claims the Board's orders are not supported by adequate or sufficient findings.

Sec. 401(h) of the Act provides, "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke such certificate, in whole or in part, for intentional failure to comply with any provisions of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate." Under this section of the statute two separate areas are defined wherein the Board has authority to act with reference to existing certificates. One area involves revocation of certificates for violations of the Act or Board regulations or orders, and the other involves alterations, amendments,

modifications or suspension of existing certificates, in whole or in part, where the public convenience and necessity so require. It will be noted that the power given to the Board to alter, amend, modify or suspend existing certificates is not punitive in character, but depends for its exercise upon the requirements of public convenience and necessity, which are the same standards under which the Board may grant certificate rights under Sec. 401(d) of the Act.

The Civil Aeronautics Act was enacted at a critical stage in the air transport industry, struggling to survive in the face of excessive competition and a number of other adverse factors. The Act was designed to bring out of chaos a system of regulated competition and the encouragement and promotion of civil aviation, not only in the interests of commerce but also in the interests of national defense. Provision was made for the Board to determine the amount of mail pay subsidy needed by a carrier to carry out its part of the program. The Board was set up as the agent of Congress to administer this program of regulation, promotion and subsidies. For many years United and other trunklines have been heavily subsidized by the federal government.

The statute permits the Board to suspend a certificate theretofore issued where the public convenience and necessity so require, but the determination of the meaning of the standards of public convenience and necessity is not left to the whim of the Board. That standard appears in nearly all public utility statutes, and, in addition, Sec. 2

of the Act provides that the Board shall consider a number of things as in accordance with public convenience and necessity.[2]

It seems unreasonable that Congress intended to give the Board power to grant certificate rights, but to deny it any authority to modify them to meet the changing demands of commerce and the national defense. The need for some flexibility in an industry characterized by continual and rapid changes is apparent. In Sec. 401(h) of the Act, Congress gave the Board authority to "alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require."

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[2]Sec. 2 of the Act, 49 U. S. C. A. 402, reads:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

The terms, "alter," "amend," and "modify" do connote some limitation. In the larger aspect any changes ordered under the Board's authority to alter, amend, and modify must be partial and not total. Further, the Board cannot be permitted to do piece-meal or step-by-step that which it has not power to accomplish in one proceeding. However, the authority of the Board to alter, amend, or modify contemplates the power to make permanent though limited changes in existing certificates. The Board has recognized this limitation by holding that an alteration ordered pursuant to the authority of this section must not be such as to transform the essential character of the carrier's operation. Panagra Terminal Investigation, 4 C. A. B. 670.

The power to suspend depends upon the same factors of public convenience and necessity as does the power to alter, amend or modify. It contemplates the continued existence of the certificate right, and the possibility that the public convenience and necessity factors giving rise to the suspension may change or come to an end. The Board had the choice to proceed under its authority to suspend, and exercised it in preference to acting under its power to alter, amend or modify.

In our judgment the Board had the authority to suspend the certificates of United to serve the five cities hereinbefore described for a definite temporary period, provided the public convenience and necessity so required. The suspension orders here in question are to be effective for a definite limited time—to March 31, 1953, in the Frontier case and to September 30, 1954, in the Southwest case.

United insists that in fact the suspensions are not temporary, but are part of a broad plan by the Board to

realign substantial segments of the air routes of the nation. Thus United questions the good faith of the Board which emphasized the temporary nature of its action. In any event United is protected by the right to a full administrative hearing before an extension of the present temporary suspensions may be ordered, and has the right of court review of any Board order entered after such hearing.

In the case of Western Airlines, Inc. v. Civil Aeronautics Board, 9 Cir. (1952—not yet reported), the Board had suspended Western's service to El Centro, California, and Yuma, Arizona, and had granted to Bonanza Airlines, a local type carrier, a route extension to provide service to those cities. Western claimed its suspension was in fact permanent and in substance a revocation, pointing out that the history of feeder air lines like Bonanza shows they are permanent. The suspension was effective to December 19, 1952. The court held that it was "merest speculation" to say that the suspension order was in substance a permanent revocation. The court said, "The Board may classify between types of air service and may find that one kind of air service is not appropriate during a certain time. To say that the Board could not substitute during that time another type of air service, required as a public necessity, would be an unreasonable limitation upon the Board's power to plot the air map, primarily in the public interest." The court affirmed the suspension order of the Board.

Our next inquiry must be whether the suspensions ordered were required by the public convenience and necessity. The Supreme Court has admonished us that in court reviews of such administrative orders as are now before us the public interest looms large. Scripps-Howard Radio,

Inc. v. Federal Communications Commission, 316 U. S. 4. Also, the doctrine has been developed that those seeking court review under provisions like Sec. 1006 of the Act, 49 U. S. C. 646, are primarily vindicating the public and not a private interest. Scripps-Howard Radio, Inc. v. Federal Communications Commission, *supra*, p. 14. In Civil Aeronautics Board v. State Airlines, Inc., 338 U. S. 572, the court said, p. 578: "The Board's major standard is the public interest in having convenient routes served by fit and able carriers," and, p. 580: "We think the standard adopted by the Board under which the public interest is given a paramount consideration is a correct standard."

It is also clear that the purpose of the Act is not primarily to advance the private interests of carriers, but the public interest in an adequate air transport system. When conflicts between private and public interests occur, the private interests of the certificate holder should yield to the broader interests of the public embodied in the concept of the public convenience and necessity. United's position amounts to this—that a route structure once established cannot be changed, absent statutory causes for revocation, without the consent of the carrier, no matter how urgent the public need may be for such a change. We do not think such a narrow construction of the Board's powers is warranted.

Keeping in mind the paramount consideration to be given to the public interest, as well as the provisions of Sec. 2 of the Act hereinbefore set forth, it is clear that the Board did not exceed its powers in ordering a temporary suspension of service by United at Rock Springs. The evidence supports the Board's finding that the traffic available at Rock Springs is insufficient to support service

by both United and Frontier. Instead of a monetary loss resulting from the suspension, United will have an operational gain of $8,665 annually according to its figures, or $31,496 annually according to the Board's calculations. In fact United suggested it would consent to a suspension of service at Rock Springs provided Frontier would purchase United's facilities and assume United's lease obligations and moving costs. However, the Board did not give its approval to this proposal.

Furthermore, the Board did not display prejudice against United as a trunkline carrier, for it determined that public convenience and necessity required the elimination of Frontier's service at a number of points including Colorado Springs which is also served by two trunkline carriers.

United's suspension and certification, instead, of service by Frontier alone at Rock Springs not only contributes to the development of an air transport system adequate to the nation's commerce and defense (Sec. 2(a) of the Act), but improves sound economic conditions in the operation of both carriers (Sec. 2(b) of the Act), and aids in the promotion of economic and efficient service by both carriers (Sec. 2(c) of the Act). The Board thus accomplished the basic purposes of public convenience and necessity as spelled out in the Act.

While many of these same considerations apply equally to the Southwest case, the financial picture is somewhat different, in that the suspension of United's service at the four California cities will result in a monetary loss to United of $150,000 annually. However, Southwest will gain approximately $200,000 annually and this will enable the government to reduce Southwest's subsidy requirements by that amount. The Board found that although

Southwest had made encouraging strides toward self-sufficiency, it could not achieve that goal in the immediate future, and further that Southwest's progress was impeded with the uneconomical competition with United at the four California cities.

The Board pointed out that United's net income before taxes was nearly $19,500,000 and concluded that the loss of $150,000, while substantial, was not sufficient to outweigh the considerations favorable to the suspensions. In applying the standard of public convenience and necessity the Board necessarily balanced various elements, such as the needs of the area for a local type air service, the cost to the government to support carriers to take care of such needs, and the probability of the reduction of that cost made possible by the suspensions, against the elements of the financial injury to United and some inconvenience to passengers. The Board weighed, and made its evaluation of, all these elements; and we cannot say that in ordering a temporary suspension of service by United at the four California cities it exceeded its authority.

United insists that the Board previously determined that public convenience and necessity required service by it at these four cities, and that traffic has increased since said dates, and, as it was first in serving said cities, the Board now has no authority to alter or suspend its certificates. But the fact that administrative judgment as to public convenience and necessity has once been made does not mean that the certificated routes are by law perpetually frozen and impervious to any change whatsoever. The Act in no way indicates that Congress intended that an air route once established could not be altered or modified in a limited degree to meet changing needs of commerce and the national defense.

We agree that the power of the Board to "suspend" does not include the power to "revoke." Had Congress intended to grant the power to revoke, other than as set forth in Sec. 401(h) for the violation of orders and regulations, it could have said so exactly as it did in Sec. 402(a) in referring to foreign air carrier permits. But the Board here acted under its power to suspend and it specifically pointed out the temporary nature of its orders. United's suspicions and convictions to the contrary, we cannot say at this time, on the record before us, that the orders issued by the Board, and designated by it as temporary, are in fact permanent revocations or realignments.

The remaining contention of United is that its certificates of convenience and necessity are property, and that the Board's orders in effect transfer its property to Frontier and Southwest without compensation, in violation of the Fifth Amendment to the United States Constitution.

Sec. 401(j) of the Act, 49 U. S. C. A. 481 (j), provides, "No certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility." Furthermore it seems clear that United and all other holders of certificates of public convenience and necessity acquire whatever rights they may possess subject to the Board's power to alter, amend, modify or suspend the certificates.

Some light is thrown upon the nature of claimed property rights in certificates of convenience and necessity by

the opinion of the Supreme Court in United States, *et al.* v. Rock Island Motor Transit Co., *et al.*, 340 U. S. 419. There the certificates had been issued by the Interstate Commerce Commission under the Motor Carrier Act and the Interstate Commerce Act, pursuant to "grandfather" provisions of said Acts. The Commission ordered modification of the certificates prohibiting in several respects the transit company's operations as they had been previously carried on. The transit company was a wholly owned affiliate of the Rock Island Railroad, and the Commission had decided that motor operations of railroads and their affiliates must be auxiliary to and supplemental of train service. The orders entered were to carry out that policy.

The district court held that the certificates were in the nature of franchise rights, and that the rights which they conferred were property of value, and held that the Commission's order violated the Fifth Amendment. 90 F. Supp. 516, 522. The Supreme Court reversed, holding among other things that the Commission's modification of the transit company's certificate of convenience and necessity was not depriving it of property without due process of law.

In the case at bar we hold that the Board's action in suspending United's service at the points involved was not a taking of United's property without due process of law, in violation of the Fifth Amendment.

Although we have discussed the power of the Board to alter, amend, and modify, we wish to emphasize that we

do not intend to indicate the limitations or the extent of the Board's authority under those provisions. It was necessary to discuss them somewhat because the power of the Board to suspend appeared in the same sentence of the statute. The only matter before us for decision is whether the Board exceeded its authority in entering the orders to temporarily suspend United's operation at the several cities. We hold that the Board did not exceed its authority and therefore the orders of the Board in each of the proceedings heretofore described will be

AFFIRMED.